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Federal Communications Commission
 Office of the Secretary

March 1, 2012

Via ECFS and Hand Delivery

Marlene H. Dortch, Secretary
 Federal Communications Commission
 445 Twelfth Street, S.W.
 Room TW-A325
 Washington, D.C. 20554

**Re: Petition for Expedited Declaratory Ruling and Clarification
 CG Docket No. 02-278**

Dear Secretary Dortch:

On behalf of GroupMe, Inc./Skype Communications S.A.R.L, enclosed for filing is an original and four (4) copies of a Petition for Expedited Declaratory Ruling and Clarification.

Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Ronald W. Del Sesto, Jr.
 Counsel for
 GroupMe, Inc./Skype Communications S.A.R.L

Enclosure

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
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GroupMe, Inc.)

CG Docket No. CG 02-278

Petition for Declaratory Ruling)
_____)

**GROUPME, INC.'S PETITION FOR
EXPEDITED DECLARATORY RULING AND CLARIFICATION**

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Dated: March 1, 2012

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Summary

GroupMe, Inc. (“GroupMe”) provides a free service enabling users to send user-initiated, real-time, non-commercial text messages and to participate in conference calls among user-created groups. GroupMe provides the application for free and does not charge for messages sent or received, for maintaining the user group lists, or for any other services. All aspects of the application and the services it supports are free. The only charge to group members who send or receive text messages through GroupMe is by wireless carriers, which impose whatever charges their members’ wireless carriers’ text messaging service plans call for.

By this Petition, GroupMe respectfully requests that the Commission issue an expedited declaratory ruling to settle two important issues that the Commission’s February 15, 2012 Order left unresolved. First, GroupMe asks the Commission to clarify the meaning of “automatic telephone dialing system” (“ATDS”) as defined in § 227(a)(1) of the Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(1) (the “Act” or “TCPA”). In particular, GroupMe seeks a ruling limiting the scope of the term “capacity” to a meaning that conforms to the statutory definition of equipment capable of autodialing random or sequential numbers but rejects an expansive misreading that threatens to sweep in tens of millions of modern smartphones and other devices that lack this capability but could be reprogrammed to acquire it.

Second, GroupMe asks the Commission to rule that wireless subscribers may consent to receive non-telemarketing, informational calls or text messages through an intermediary. These informational calls, unlike telemarketing calls, can be made using an ATDS with the called party’s *oral* prior express consent, but sometimes only an intermediary is able to provide the recipient’s consent to receive a call or text message.

Due to the ambiguous term “capacity” in the statutory definition of ATDS, as well as uncertainty as to how “prior express consent” may be given especially where intermediaries are involved, class action litigation has proliferated over new technologies and services that neither Congress nor the Commission intended to include within the statute’s ambit and regulations. The Commission has previously determined that Congress delegated authority to the Commission to define ATDS. And, as the Commission notes in its *2012 TCPA Order*, the statute is silent as to what constitutes “prior express consent.” By this Petition, GroupMe respectfully asks the Commission to adopt a definition of ATDS that excludes technologies with a theoretical capacity, but not the actual capability, to autodial random or sequential numbers and to rule that consent to certain non-telemarketing, informational calls or text messages to wireless numbers may be given through intermediaries.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)

GroupMe, Inc.)

Petition for Declaratory Ruling)

CG Docket No. CG 02-278

PETITION FOR EXPEDITED DECLARATORY RULING AND CLARIFICATION

GroupMe, Inc. (“GroupMe”),¹ through counsel, and pursuant to Section 1.2 of the Federal Communication Commission’s (“Commission” or “FCC”) rules, respectfully requests that the Commission issue an expedited declaratory ruling concerning the meaning of the term “automatic telephone dialing system” (“ATDS”) under § 227(a)(1) of the Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(1) (the “Act” or “TCPA”). In particular, GroupMe respectfully requests a ruling clarifying and limiting the scope of the term “capacity” as used therein. Additionally, GroupMe respectfully requests that the Commission clarify that third-party consent is sufficient for non-telemarketing, informational calls or text messages to wireless numbers made using an ATDS under the TCPA. Both of these issues require Commission clarification because they are dispositive of federal district court claims pending against GroupMe and the Commission has primary jurisdiction over the issues which were left unresolved in the recent *2012 TCPA Order*.²

¹ GroupMe, Inc. was acquired by Skype in August, 2011.

² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (2012) (“*2012 TCPA Order*”).

Texting is one of the most popular forms of communication among Americans, especially with young adults. Its emergence as a preferred method of communications for millions has led to the development of a variety of applications to enable those who prefer texting to do so efficiently, both with other individuals and groups. GroupMe is one such service, offered for free, that allows a group creator to define a group of individuals who may exchange non-commercial text communications of interest to the individuals that comprise the group.³

Due to the ambiguous definition of ATDS in the statute, as well as confusion as to what satisfies the “prior express consent requirement,” class action litigation has proliferated to sweep in technologies and services that neither Congress nor the Commission reasonably could have intended to include within the statute’s ambit and implementing regulations. The incongruity of the definition of an ATDS under the TCPA with the capability of ordinary consumer devices widely available in today’s marketplace is illustrated by the fact that GroupMe has been sued in a putative class action alleging violation of the TCPA for its group texting application.⁴ The TCPA’s ATDS definition now seemingly encompasses everything from equipment that actually randomly or sequentially generates and dials telephone numbers to the ubiquitous smartphone or laptop computer which may have the “capacity” to perform those same functionalities, albeit only after a significant re-design of the software.

³ Note that the GroupMe application also allows for non-commercial conference calls among all the group members as well. This Petition references the texting capability of the application as that is the basis for the litigation referenced herein. But GroupMe expects that should the FCC rule as requested by this Petition, the ruling would apply equally to texting and calls since neither the TCPA nor the FCC’s rules distinguish between these two services.

⁴ See generally, *Glauser v. Twilio, Inc. and GroupMe, Inc.*, United States District Court, Northern District of California, No. 4:11-cv-02584 (PJH). The case has recently been stayed by order of the court, for among other reasons, to enable the Commission to clarify the TCPA’s definition of an ATDS and what it means for equipment to have the “capacity” to randomly or sequentially generate and dial telephone numbers.

Similar putative class action lawsuits based upon the TCPA claims, including one against another group text messaging provider filed by the same law firm that represents the plaintiff suing GroupMe,⁵ likewise rely on the TCPA's ambiguous ATDS definition. These lawsuits, rather than discouraging practices that Congress and the Commission have found to harm consumers, stifle innovation and the emergence of new and valuable communications tools.

The Commission has determined that Congress provided it with the authority to define ATDS under the TCPA.⁶ As the Commission notes in its *2012 TCPA Order*, the statute is silent as to what constitutes "prior express consent."⁷ By this Petition, GroupMe respectfully requests that the Commission clarify that the term 'capacity' as used in the statutory definition of ATDS under § 227(a)(1) of the TCPA encompasses only equipment that, at the time of use, could, in fact, have employed the functionalities described in the TCPA without human intervention and without first being technologically altered;⁸ and clarify that third party consent obtained through an intermediary satisfies the Act's requirement for "prior express consent" for certain non-telemarketing, informational calls or text messages to wireless numbers.

⁵ See generally, *Pimental, et al. v. Google, Inc. and Slide, Inc.*, United States District Court, Northern District of California, No. 4:11-cv-02585 (YGR).

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14092 (July 3, 2003) ("*2003 TCPA Report and Order*") ("It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.").

⁷ *2012 TCPA Order*, at ¶ 21.

⁸ See Section III, *infra*.

I. TEXT MESSAGING SERVICES ENABLED BY GROUPME

A. All of GroupMe's Offering are Free

GroupMe, founded in May, 2010, is a free group text messaging service that facilitates user-initiated, real-time, non-commercial group communications among user-created groups. GroupMe provides the application for free and does not charge for messages sent or received, for maintaining the user group lists, or for any other services. In short, all aspects of the GroupMe application and services it supports are free. The only charges to group members who send or receive text messages through GroupMe is by wireless carriers, which impose any applicable charges based on the members' wireless carriers' text messaging service plans. Those recipients that subscribe to unlimited texting plans will receive no additional or per message charges associated with the text messages received through the GroupMe application. GroupMe also offers a free application for those that participate in GroupMe text messaging groups but do not wish to incur texting fees. The application allows users to send and receive text messages through the application over a data connection so that the user does not incur charges for text messaging since the user is not actually using Short Messaging Services ("SMS").

The nature of the groups that GroupMe enables are as diverse as the individuals who create them. Some groups comprise family members, others friends who share a common interest (like sports or music), while others may be event-driven (like an *ad hoc* group of friends who want to meet after school or work). In short, GroupMe groups are the text-message equivalent of email list servers and newsgroups. GroupMe has even emerged as an alternative communication tool in the face of natural disasters. In April 2011, when tornadoes ripped through the South shutting down power and telephone land lines, users relied on GroupMe in place of traditional means of communication that were unavailable due to the severe storm damage.

GroupMe enabled emergency personnel as well as ordinary citizens to establish their own text-messaging groups that allowed families and friends to maintain open channels of communications in the tornado-ravaged areas.²

B. GroupMe Empowers User-Initiated, Non-Commercial Group Speech

In order to use the GroupMe application, a group creator must register with GroupMe. Registration can occur either by downloading the application onto the user's smartphone or through any computer connected to the Internet. Either way, the group creator must agree to the terms of service. They require the group creator to represent that any individual added to the group has consented to be added and to receive text messages from the creator, other group members, and GroupMe.¹⁰

Once registered, the group creator can create a group of twenty-four or fewer individuals. The average group size is five. GroupMe limits the group size to encourage use of the application in a manner consistent with its purpose, *i.e.*, enabling non-commercial communication among groups of individuals known to the group creator. While GroupMe does not restrict or edit the content of the communications group creators transmit, the size limit effectively discourages commercial use. The terms of service also require the user to "ensure that the Content is not spam, is not machine- or randomly-generated, and does not contain commercial content."¹¹ Accordingly, the application is meant to allow for personalized, non-commercial communications among a user-defined group where the communication is of the user's, and then the group's, choosing.

² See <http://blog.groupme.com/post/5453810517/when-disaster-strikes>

¹⁰ GroupMe's terms of service can be found at <http://groupme.com/terms>

¹¹ The "User Responsibilities" section of GroupMe's terms of service contains this prohibition. See <http://groupme.com/terms>

C. Technical Details of GroupMe's Offering

In order to facilitate texting among a group, GroupMe assigns the group a unique ten-digit number, which GroupMe uses to send text messages over the Internet.¹² GroupMe works with providers of web-based application programming interfaces ("APIs") like Twilio, Inc. ("Twilio"), to route the text message over the Internet to each group member so that specific group members receive the message simultaneously. When a member sends the group a subsequent text message, GroupMe's software similarly uses the APIs to route the new message to other members. GroupMe simplifies sending group text messages by allowing members to send a single text message to the GroupMe-assigned number that is then used to transmit the text message to all group members. GroupMe interacts with Twilio to route the user-initiated messages to their destinations through the ten-digit number assigned to the group. Twilio connects to the traditional telephone networks and to the Internet through APIs. GroupMe's technology, however, does not initiate the transmissions between the group members and it does not directly contact the telecommunications providers that deliver the group's text messages to wireless telephones. The text messages are delivered using "long code," as opposed to "short code" SMS, which is further evidence of the non-commercial nature of the communications.

GroupMe enables family and personal networks to communicate with one another *en masse* and in real time. As a testament to its personal nature, "Mom" and "Dad" are the most common group names on GroupMe's servers. All group text messages delivered using GroupMe's service are user-initiated except for up to four administrative text messages sent to a group's members. These administrative messages occur immediately subsequent to, and are

¹² The same 10-digit number can be used to initiate a group conference call.

triggered by, the creation of a group and may include one or two text messages sent to advise a group member that he or she may be dropped from the group due to the member's failure to respond that he or she wants to remain part of the group. GroupMe's technology does not randomly or sequentially generate or dial the telephone numbers of group members, and it does not initiate any of the transmissions. In fact, GroupMe's technology has never been capable of performing such functions and, to do so, would need to be reprogrammed to include software modules not even built.

D. Administrative Text Messages GroupMe Sends

The administrative text messages GroupMe sends to group members are never more than four and are triggered by the group creator.¹³ The designated group members receive the first group text message from GroupMe containing the name of the creator, names of the friends that comprise the group, and the unique ten-digit number assigned to the group that enables future communication among the group members. Next, group members receive a message from GroupMe instructing them how to stop receiving the text messages and how to download GroupMe's free application to avoid text messaging charges from their wireless carriers. A representative message follows:

GroupME is a group texting service.
Standard SMS rates may apply.
Get the app at <http://groupme.com/a> to chat for free.
Reply #exit to quit or #help for more.

Members may receive a third message saying they have been inactive for a specified period of time, warning that they will be removed from a group. Finally, if group members

¹³ A text message is sent to the group creator and it consists of a confirmation text message after he or she completes the process of registering for GroupMe. A representative text message received by a group creator is: "Welcome to GroupMe! Group texting, calling & more. Your confirmation code is ABCDE. Msg. & data rates may apply."

remain inactive following the warning message, they will receive a fourth and final message that they have been removed from the group due to their inactivity. These final two text messages are to ensure that a group member is not unintentionally dropped from the group. In other words, GroupMe requires that all members of the group take an affirmative action in order to remain part of the group even though the group creator is responsible for identifying individuals that will participate in the group in the first instance. All of the foregoing confirmation and administrative messages are triggered solely in response to actions by the group creators and users. No additional text messages are generated by GroupMe apart from those described here.

E. GroupMe is Not a Marketing Tool and Prohibits Commercial Use

GroupMe is not a marketing tool, does not generate commercial advertisements, and has implemented policies and procedures to prevent individuals from using the service for commercial purposes. GroupMe informs each group member how to stop receiving text messages from the other group members and how to avoid text messaging charges from wireless carriers. GroupMe limits its administrative messages to a bare minimum of informational messages, such as advising group members that they have been added to a group, telling them how to be removed from a group, and, when users are inactive, that they will be removed. GroupMe has never sent a blast SMS text message to all GroupMe users and, in fact, is technologically incapable of doing so. Messages are delivered to no more than twenty-five people at a time (twenty-four group members plus the group creator), but in general less because the average group size is five. Messages are triggered solely in response to group creators' and users' actions. Approximately 40% of GroupMe messages are delivered by the application rather than via native text messaging services available on users' wireless phones limiting wireless text messaging charges by wireless carriers and those messages are not at issue.

II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING CLARIFYING AND LIMITING THE SCOPE OF THE TCPA'S DEFINITION OF AN ATDS

The TCPA prohibits making “any call” to a cellular telephone, without the prior express consent of the called party, using an ATDS.¹⁴ The statute defines ATDS as “equipment which has the *capacity* – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹⁵ The Commission has previously concluded that Congress provided the agency with the discretion to determine what technologies constitute an ATDS.¹⁶ Advances in technology can justify limiting a definition to preserve a statute’s intended scope.¹⁷ Despite a revolution in mobile technology since Congress enacted the TCPA, the Commission has yet to clarify what is meant by “capacity” except to note, in its *2003 TCPA Report and Order* on whether “predictive dialers” without the ability to generate telephone numbers constitute ATDS, that:

In the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more effective. The basic function of such equipment, however, has not changed – the *capacity* to dial numbers without human intervention.¹⁸

Without the Commission’s guidance, some courts have read “capacity” to encompass: (1)

¹⁴ See 47 U.S.C. §§ 227(b)(1)(A), 227(b)(1)(A)(iii).

¹⁵ 47 U.S.C. § 227(a)(1) (emphasis supplied).

¹⁶ See *2003 TCPA Report and Order*, 18 FCC Rcd. at 14092.

¹⁷ See, e.g., JPMorgan Chase & Co., Reply Comments, CG Docket No. 02-278, at 5 (June 21, 2010) (“JPMC and other commenters have shown that technology developments can warrant an easing– not just a ‘ratcheting up’– of TCPA restrictions.”).

¹⁸ *2003 TCPA Report and Order*, 18 FCC Rcd at 14092. The FCC’s *2003 TCPA Report and Order* went on to find that certain types of machines, namely “predictive dialers,” qualify as ATDS under the statutory definition. *Id.* at 14092-93.

equipment capable of autodialing random or sequential numbers whether or not used for that purpose; and (2) equipment that could be altered to make it capable of autodialing random or sequential numbers.¹⁹ Both of these interpretations are problematic, but the second would expand “capacity” to sweep in tens of millions of smartphones for which applications could be downloaded to program them to autodial random or sequential numbers, or widely available equipment like GroupMe and many other companies use that is incapable of autodialing random or sequential numbers but could be programmed to do so if software for that purpose was written and installed.

Whereas, in 1991, it may have been rare for equipment to have the “capacity to store or produce telephone numbers,” much of our everyday technology, including smartphones and social networking mediums, can be altered to either unlock a dormant ATDS function or add such a function via new software.²⁰ For example, a new iPhone right out of the box could qualify as an ATDS if “capacity” is read expansively because an iPhone has the “capacity” to download an ATDS application from the iTunes store.²¹ Furthermore, nearly any smartphone has the “capacity” of dialing numbers randomly or sequentially if a user installs an application for this

¹⁹ See, e.g., *Satterfield v. Simon & Schuster, et al.*, 569 F.3d 946, 951 (9th Cir. 2009) (“Accordingly, a[n] [ATDS] need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.”).

²⁰ See, e.g., Wells Fargo & Co., Comments, CG Docket No. 02-278, at 20 (filed May 21, 2010) (“The ‘capacity to store or produce telephone numbers,’ once a rare functionality, has become commonplace among numerous electronic products, including the ubiquitous smartphone.”).

²¹ The iDialUDrive application for the iPhone advertises itself as providing the ability to “Sync your phone lists from the web over 3G or WiFi! Have someone else maintain your phone lists of important calls to make on your way to the airport or to work in the morning. Sync when you get in the car and have your calls start dialing without ever touching the phone again.” See <http://itunes.apple.com/us/app/idualudrive/id288947187?mt=8>.

purpose, since these devices are programmable in much the same manner as general-purpose computers.

If that broad and seemingly limitless definition of “capacity” does, in fact, apply, businesses and consumers unsuspectingly may violate the TCPA when, for example, they send a text message to a wrong number that is assigned to a wireless subscriber. If the TCPA is interpreted as prohibiting sending a text message using equipment that has the “capacity” to be an ATDS, an iPhone could be interpreted to be an ATDS. A recipient of such a mistakenly transmitted text message could allege a private right of action under the TCPA as the sender, using an ATDS, did not have the “prior express consent,” neither oral nor written, of the recipient.²² Indeed, even a manually-dialed voice call to an *intended* number could be construed to violate the TCPA if the called party had not consented in advance to receive it, as long as the originating device had the “capacity” to place automated calls. While GroupMe believes that these results are and should be absurd, it may be difficult for a defendant in such a hypothetical lawsuit to succeed on a motion to dismiss. Faced with appellate decisions that seemingly embrace this expansive definition of capacity, district courts are reluctant to dismiss even absurd cases like these without allowing expensive discovery followed by summary judgment motions or trial. If the Commission has any doubt as to how much litigation the TCPA has spawned under equally absurd theories, it need

²² See *2012 TCPA Order*, at ¶ 29 (“We leave it to the caller to determine, when making autodialed or prerecorded *non-telemarketing* calls to a wireless number, whether to rely on oral or written consent in complying with the statutory consent requirement.”) (emphasis in original). In sending a text message to a wrong wireless telephone number, the sender could not have obtained consent as required under the FCC’s rules.

only review the Petitions multiple parties filed in this docket and the cases cited therein.²³ Much of the litigation stems from strained interpretations of the term “capacity” where any device or software *capable* of being programmed as ATDS is read as covered by the TCPA without regard to whether it is actually used or provisioned as an ATDS or even if it is incapable of being so used without downloading or writing and installing software for that purpose.

The Commission should reject this formalistic interpretation of the TCPA and the Commission’s implementing regulations, because the legislative history of the TCPA makes clear that Congress did not intend to capture a communication tool like GroupMe’s in its scope when defining ATDS. Of course, the legislative history does not speak to text messaging specifically as it was not a prevalent form of communication when the TCPA was adopted in 1991.²⁴ But the legislative intent to outlaw uninvited, disruptive autodialing that causes consumer harm is clear enough. The report provides examples of the consumer harm it sought to prevent. For example, calls placed by ATDS “can ‘seize’ a recipient’s telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well.”²⁵ The Senate report also highlights the disconnection issue as a significant problem, noting that “Automated

²³ See, e.g., *Global Tel*Link Corporation Petition for Expedited Clarification and Declaratory Ruling*, at 7-8, 17-18 (filed March 4, 2010); *infra* n. 32 (citing to cases in a separate Petition).

²⁴ The FCC determined in 2003 that the TCPA also included texts. See *2003 TCPA Report and Order*, 18 FCC Rcd at 14115. In 2004, the FCC found that the restriction on using ATDS also applied to text messages. See *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 15927, 15934 (2004).

²⁵ H.R. REP. NO. 102-317, at 11 (1991).

calls often do not disconnect the line after the called party hangs up, thereby preventing the called party from receiving other messages from other callers.”²⁶ Similarly, the Commission found that ATDS “can deliver prerecorded messages to thousands of potential customers every day.”²⁷ The Commission also determined that predictive dialers “which initiate phone calls while telemarketers are talking to other consumers, frequently abandon calls before the telemarketer is free to take the next call.”²⁸

The legitimate consumer harms that Congress addressed in enacting the TCPA, as well as the Commission’s efforts to further protect consumers, are not present as applied to GroupMe’s service or its application. As explained above, GroupMe’s software limits the group size to twenty-four and the average size group is five. The application is not programmed to engage in mass text messaging and is not capable of sending text messages to randomly generated or sequential telephone numbers. Instead, users supply the individual telephone numbers that comprise the small user-defined groups. Text messages do not seize the recipients’ lines but can be delivered during a call without interrupting the call in progress. And the recipient of the text message does not lose the ability to place a call when a text message is received. Moreover, GroupMe offers a free application for those that wish to participate in the group but do not want to incur text messaging fees from their wireless carriers.

Much of the legislative history also demonstrates that ATDS had become a nuisance because of the efficiency gains marketers realized when implementing a system that “ensure[s] that a company’s message gets to a potential customer in the exact same way, every time,

²⁶ S. REP. NO. 102-178 at n.5 *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972 n.5 (1991).

²⁷ 2003 TCPA Report and Order, 18 FCC Rcd at 14022.

²⁸ *Id.*

without incurring the normal cost of human intervention.”²⁹ GroupMe enables communication that is to the opposite of these mass-produced marketing communications. Instead, user-initiated communications through the GroupMe service are initiated by a person, the group creator, to enable a small group to participate in a personal, group discourse rather than the one-way, generic speech that characterizes mass telemarketing. Indeed, human intervention and discourse are the hallmark of GroupMe and are the only reason to use it, in stark contrast to impersonal, uninvited, and intrusive commercial speech that Congress targeted through the TCPA.

III. GROUPME’S PROPOSED DEFINITION OF “CAPACITY”

GroupMe requests that the Commission issue a ruling defining “capacity” to encompass only equipment that, at the time of use, could, in fact, have autodialed random or sequential numbers without human intervention and without first being technologically altered. GroupMe’s technology, as discussed above, would not meet such a definition. It has never been able to randomly or sequentially generate and dial telephone numbers. All of the text messages routed and directed using its service are initiated by the text message originators (they are not automated), and the text messages are sent to a specific list of user-provided telephone numbers. Under the proposed clarification of “capacity,” GroupMe’s technology would not be swept in just because it could be reprogrammed to perform those tasks if new software were written and installed.

A recent petition filed by SoundBite Communications, Inc. (“SoundBite”), illustrates how pervasive the problem of class action litigation under the TCPA has become due to the lack of direction from the Commission as to what equipment constitutes ATDS. In its petition,

²⁹ See H.R. REP. NO. 102-317 at 8.

SoundBite explains that “The software used to send SoundBite’s confirmation text messages to those individuals requesting an opt-out does not allow random or sequential calls. The software only allows confirmation messages to those consumers specifically requesting opt-out.”³⁰ SoundBite has become embroiled in TCPA class action litigation because, like GroupMe, plaintiffs alleged that SoundBite, or customers that rely on SoundBite’s services, uses an ATDS even though SoundBite states that its system “has absolutely no capacity to store, look-up, or dial in any random or sequential order”³¹ But due to the confusion concerning the scope of the definition of ATDS plaintiffs simply need to allege the use of an ATDS to file a class action lawsuit.³²

Importantly, should the Commission issue a ruling interpreting “capacity” as proposed by GroupMe, this would in no way insulate bad actors from liability. It would not exclude the “basic function” of an autodialer from the TCPA’s definition, *i.e.*, the ability to “dial numbers without human intervention.”³³ The use of equipment with the actual capability to randomly or sequentially generate and dial telephone numbers at the time of use would still be prohibited. But GroupMe’s proposed ruling from the Commission on “capacity” would not undermine or reopen the Commission’s *2003 TCPA Report and Order* or *2008 Declaratory Ruling*³⁴ regarding

³⁰ *SoundBite Communications Inc. Petition for Expedited Declaratory Ruling*, at 6 (filed Feb. 16, 2012).

³¹ *Id.* at 6.

³² *See id.* at 2, n.4. *See, e.g., Annoni v. FYIsms.com, LLC*, No. 11-cv-1603 (N.D. Ill), Amended Complaint at ¶¶32-33 (filed May 11, 2011) (alleging use of an ATDS relying on reference in the TCPA to “capacity” and the *2003 TCPA Report and Order* interpreting same). The remaining eight class action lawsuits cited allege use of an ATDS.

³³ *2003 TCPA Report and Order*, 18 FCC Rcd at 14091-92.

³⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559 (2008) (“*2008 Declaratory Ruling*”).

predictive dialers. Those rulings found predictive dialers to be ATDS because they initiate and “dial numbers” from a “database of existing telephone numbers” or “customer lists” without requiring human intervention to initiate the process.³⁵

The debt collection industry has asked the Commission to re-examine the predictive dialer issue because it relies on such technology to efficiently conduct “dialing campaigns” to debtors who the dialers and computer databases have determined are past due on payments.³⁶ As explained above, GroupMe’s technology is not so capable; it relies entirely on the actions of users to initiate any text message.

IV. THE COMMISSION SHOULD CLARIFY THAT CONSENT FOR CERTAIN CALLS UNDER THE TCPA MAY BE GIVEN THROUGH INTERMEDIARIES

GroupMe also requests that the Commission clarify the type of consent required for services like those offered by GroupMe. The Commission’s *2012 TCPA Order* requires “some form of prior express consent for autodialed or prerecorded *non-telemarketing* calls to wireless numbers.”³⁷ In the *2012 TCPA Order*, the Commission “leaves it to the caller to determine, when making an autodialed or prerecorded *non-telemarketing* call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent requirement.”³⁸ But

³⁵ *2008 Declaratory Ruling*, 23 FCC Rcd at ¶ 12; *2003 TCPA Report and Order*, 18 FCC Rcd at 14091-96.

³⁶ *See, e.g., Notice of Ex Parte Presentations by Encore Capital Group, Inc. and Midland Credit Management*, CG Docket No. 02-278, ¶¶ 12-14 (filed Sept. 22, 2011); *see also Griffith, et al. v. Consumer Portfolio Serv., Inc.*, United States District Court, Northern District of Illinois, No. 10-C-2697, Dckt. No. 65 (Aug. 16, 2011) (finding that defendant credit collection agency used an autodialer where its dialer worked in conjunction with its computer database to review credit files and dial the telephone numbers of those debtors past due on their payments without human intervention).

³⁷ *2012 TCPA Order*, at ¶ 29 (emphasis in original).

³⁸ *Id.* (emphasis in original).

obtaining consent from the recipient of a text message, however, is not possible in all instances even when the recipient of a text message would like to receive the text message.

One example can be found in the comments filed by the United Parcel Service, Inc. (“UPS”).³⁹ UPS stated that it relies on autodialed and prerecorded calls and text messages “to provide various informational messages to certain customers and package recipients.”⁴⁰ But in many instances, and for a variety of reasons, UPS sends text messages to the recipient of the package using a wireless number that was provided by the sender.⁴¹ UPS is unable to obtain text message recipient’s consent to send a message that the package has been delivered, for example, because UPS has no contact with the recipient until the time of delivery.⁴²

In the *2012 TCPA Order*, the Commission recognized the tension between its interpretation of the kind of consent that is required for non-telemarketing calls and “unnecessarily restrict[ing] consumer access to information communicated through purely informational calls.”⁴³ Many commenting parties also advised the Commission that consumers have come to rely on text messages in the absence of advance express consent of any sort and argued that overly burdensome regulations restricting informational text messages would be inconsistent with the TCPA’s goals. The Commission agreed that it did not want to impede calls or text messages for purely informational communications like “bank account balances, credit fraud alert, package delivery, and school closing information....”⁴⁴

³⁹ United Parcel Service, Inc., Comments, (filed July 15, 2010).

⁴⁰ *Id.* at 3.

⁴¹ *See id.* at 3-4.

⁴² *See id.* at 4.

⁴³ *2012 TCPA Order*, at ¶ 21.

⁴⁴ *2012 TCPA Order*, at ¶ 21.

Without a clear interpretation, class action plaintiffs may argue the rule as adopted in the *2012 TCPA Order* does not allow a company to send an autodialed non-commercial text messages unless the company receives prior express consent directly from the *recipient* of the text message.⁴⁵ But interpreting the rule to require consent to come directly from the recipient would conflict with the Commission’s finding that consumers expect and would like to receive informational messages like those sent by “package delivery” services and that such messages should be allowed.⁴⁶ UPS explained that it could not obtain consent directly from the recipient of the text message because it had no direct relationship with the recipient.

Given the ambiguity in the *2012 TCPA Order*, coupled with the likelihood of litigation over this issue, GroupMe respectfully requests that the Commission make explicit that which is implicit in the *2012 TCPA Order*. Specifically, the Commission should make clear that for non-telemarketing, informational calls or text messages to wireless numbers, which can permissibly be made using an ATDS under the TCPA with the called party’s oral prior express consent, the caller can rely on a representation from an intermediary that they have obtained the requisite consent from the called party.

As explained above, GroupMe provides a free service that enables users to send user-initiated communications to a limited group of people defined by the group creator. The group creators represent that they have permission to send text messages to members of the group and the terms of service prohibit sending spam or using the service for a commercial purpose. GroupMe relies on such consent and it is analogous to the problem faced by UPS. The Commis-

⁴⁵ See *id.* at ¶ 29.

⁴⁶ *Id.* at ¶ 21.


sion determined that information like that transmitted by UPS should be allowed under the TCPA. So should other informational communications where an intermediary represents that the recipient invited the communication. This type of informational communication service was not what Congress had in mind when it adopted the TCPA and it does not raise any of the consumer protection issues the Commission sought to resolve in its implementing regulations.

CONCLUSION

For the foregoing reasons, GroupMe requests that the Commission issue a ruling on two issues. First, the Commission should define "capacity" under Section 227(a)(1) of the TCPA as encompassing only equipment that, at the time of use, could, in fact, have employed the functionalities described in the TCPA without human intervention and without first being technologically altered. Second, the Commission should rule that for non-telemarketing, informational calls or text messages to wireless numbers, which can permissibly be made using an ATDS under the TCPA with the called party's oral prior express consent, the caller can rely on an intermediary obtaining consent from the called party.

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